77-1795

IN THE

Supreme Court of the United States

OCTOBER TERM, NO. .....

SVENSKA ORIENT LINEN,

Petitioner,

—against—

MIQUEAS TEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

Supreme Court of the United States

October Term, No. .....

Svenska Orient Linen,

Petitioner,

—against—

Miqueas Ten,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner seeks a writ of certiorari to review the Judgment of the United States Court of Appeals for the Second Circuit which reversed the District Court's dismissal of this action under Rule 41(b) of the Federal Rules of Civil Procedure.

Citations to Opinions Below

The Opinion of the Court of Appeals, not yet officially reported, is set forth in the Appendix, as are the minutes of the hearing before the District Court and the subsequent denials of Respondent's motion under Rule 60(b) F.R.C.P., and his motion to reargue (A. 1a-26a).

Jurisdiction

The judgment of the Court of Appeals was entered on March 31, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §§1254(1) and 2101(c).

Questions Presented

1. Whether under F.R.C.P. 41(b) and *Link* v. *Wabash Railroad Co.*, 370 U.S. 626 (1962) a District Court has discretion to dismiss a complaint for plaintiff's attorney's refusal to proceed with a scheduled trial where the unavailability of his client is due to foreseeable medical complications?

2. Whether, in the light of *National Hockey League* v. *Met. Hockey Club*, 427 U.S. 639 (1976) the limited review of a District Court's discretionary dismissal permits the Court of Appeals to make its own findings as to the foreseeability of plaintiff's medical complications?

Statutes Involved

No statutes are involved. Rule 41(b) of the Federal Rules of Civil Procedure is set out in the Appendix (A. 27a).

Statement of the Case

This action was brought by Respondent to recover damages for injuries which he sustained on September 12, 1972, while working as a longshoreman in the employ of Nacirema Operating Co., Inc., aboard Petitioner's m/s LAKE EYRE. Nacirema was subsequently impleaded as a third party defendant.

On February 23, 1977, the Honorable Richard Owen of the United States District Court for the Southern District of New York dismissed the case for failure to prosecute. He later denied Respondent's motion under Rule 60(b) F.R.C.P. to vacate the dismissal and a subsequent motion

to reargue. The Court of Appeals for the Second Circuit, in an Opinion dated March 31, 1978, reversed Judge Owen and reinstated the complaint.

The Facts

This was a longshoreman's suit for personal injuries sustained aboard ship and in which the stevedore-employer was impleaded as a third party defendant.* Protracted by numerous motions required to compel discovery (see docket sheet entries, Appendix 28a-34a), it was not until December 6, 1976, with all discovery finally closed, that the case was called for a third pre-trial conference before Judge Owen. At the conclusion of the conference, Judge Owen advised counsel for all parties that the case would be reached for trial some time during the first three weeks of February, 1977, and referred it to Magistrate Raby for the formulation of a pre-trial order. At that point counsel for Respondent came under a duty to ascertain his client's availability. As will be seen, counsel did not do so.

Reminding counsel of the anticipated trial date, Magistrate Raby, in a letter dated December 20, 1976, scheduled a conference for the preparation of the pre-trial order. A copy of the Magistrate's letter is reprinted in the Appendix as is his subsequent report of February 16, 1977 (A. 35a-39a), reciting the difficulties encountered in attempting to formulate the order. As of February 16, counsel for Respondent had refused to sign the proposed pre-trial order and, accordingly, it was forwarded to Judge Owen with the Magistrate's recommendation that it be signed by and become the order of the Court. On February

* The cause of action arose prior to the effective date of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act and, accordingly, was not affected by those changes.

16, Judge Owen's Chambers telephoned Respondent's counsel to advise that the trial would begin on February 22. At counsel's request, Judge Owen agreed to postpone the trial to the 23rd. There were no further Court appearances until February 23, 1977,* the date set for trial with the consent of Respondent's counsel. There ensued on that date the hearing on Respondent's last-minute application for a continuance (A. 7a-23a). After considering counsel's arguments, Judge Owen denied the application. When counsel for Respondent indicated, in a manner later described by the Court of Appeals as ". . . brash and almost, but not quite, contemptuous," that he would refuse to proceed, the case was dismissed.**

It is clear from a reading of the transcript of the hearing that Judge Owen was willing to take all reasonable steps to accommodate the stated difficulties of Respondent's counsel, short of granting the indefinite adjournment which he demanded.

According to his counsel, Respondent had moved to Puerto Rico some time after the accident in suit and his condition had been worsening during the six-month period prior to the scheduled trial date (A. 9a, 16a). In fact, counsel quoted Respondent's wife as saying, on February 17: "We have been trying to stay out of going to a hospital. We know if we go to a hospital he will be hospitalized because we are waiting for a call from you day to day since October that we will have to go to trial. We have been trying to stay out of the hospital, but he is so bad that he can't

* This date closely approximated that anticipated by the Trial Judge over two and one-half months earlier.

** Counsel's "brash" attitude was further emboldened in his affidavit in support of the motion, dated March 23, 1977, under 60(b) F.R.C.P. where he refers to "Judge Owen's attempt to write his own record . . ." and "[T]he Court's myopic insistence upon expeditiousness." [A. 43a, 45a].

travel" (A. 9a). Although counsel knew, as early as December 6, 1976, that the trial would take place in mid-February, 1977, no attempt was made to advise Respondent of the need for him to come to New York until February 17, 1977. Nevertheless, when called by Judge Owen's Chambers on February 16, 1977, counsel stated that he would be prepared to proceed on February 23 (A. 9a, 20a). Counsel thus represented to the Court that his client, known to be a resident of Puerto Rico and the plaintiff in a "total disability case" (A. 18a), whose physical condition had been "worsening during the past six months" (A. 16a), would be ready for trial. No suggestion was ever made by Respondent's counsel that a further deposition of his client would be necessary.*

There is no question that the thrombophlebitis and cellulitis which purportedly hospitalized Respondent on February 19, 1977, are claimed by his counsel to be the direct result of the accident in suit (A. 9a, 41a). In the face of this claim it is difficult to rationalize the Court of Appeals finding that Respondent's medical complications were not foreseeable.

With the trial date set, Petitioner's counsel arranged for the Chief Officer of the m/s LAKE EYRE to come from Europe to testify. The Chief Officer was present in Court on February 23.

* Petitioner's counsel took Respondent's deposition, pursuant to notice, on December 2, 1974. To date, Respondent has not indicated in what respects his testimony, if taken now, would differ from that previously given (see p. 13, *infra*).

Reasons for Granting the Writ

(1) The District Court Properly Exercised Its Discretion in Dismissing the Complaint Under Rule 41(b) F.R.C.P. and *Link* v. *Wabash Railroad Co.*, 370 U.S. 626 (1962).

Rule 41(b) F.R.C.P., pursuant to which this case was dismissed, specifically authorizes such a result "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court, . . ." It is difficult to imagine a more glaring example of a plaintiff's failure to comply with an "order of court" than where his counsel, knowingly and deliberately, refuses to proceed with a scheduled trial. There is no question that counsel received adequate notice of the approximate trial date and knew of and consented to the exact date at least one week in advance. It is apparent, too, that counsel failed to take any steps to ascertain his client's availability between December 6, 1976, when the approximate date was made known and February 16, 1977, when the exact trial date was set (A. 9a, 19a). Had he done so, he could have ascertained that his client's physical condition, as later acknowledged to Judge Owen, had been "worsening during the past six months" (A. 16a); that Respondent had been "trying to stay out of going to a hospital" (A. 9a), and counsel would have been under a duty to prepare his case accordingly. Parenthetically, counsel's actual knowledge in this regard is somewhat ambiguously set forth, for, as he also stated to Judge Owen on February 23, (A. 21a):

> ". . . [A]nd also that when he was informed—the plaintiff, meaning your deponent, was informed of the plaintiff's physical condition just recently *in December*.
>
> "The plaintiff was able at great effort to travel. His condition has constantly worsened because of the delay in the calendar." [emphasis added].

On only one occasion, *Link* v. *Wabash Railroad Company*, 370 U.S. 626 (1962), has this Court considered the authority of the District Court to, *sua sponte*, dismiss a personal injury action under Rule 41(b) F.R.C.P. There, plaintiff's attorney had failed to appear at a pre-trial conference and, two hours later, the complaint was dismissed. In assessing the lower court's action, this Court noted initially, 370 U.S. at p. 629:

> "The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts."

The Court then confined the scope of review of such dismissals at p. 633:

> "Accordingly, when circumstances make such action appropriate, a District Court may dismiss a complaint for failure to prosecute even without affording notice of its intention to do so or providing an adversary hearing before acting. Whether such an order can stand on appeal depends not on power but on whether it was within the permissible range of the court's discretion." •

In contrasting the pertinent circumstances in *Link* with those in the instant case, it is small wonder that Judge Owen ultimately resorted to a dismissal of the complaint! Here, the dismissal was occasioned by the knowing and intentional refusal of Respondent's counsel to comply with

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• The identical test was applicable to the denial of Respondent's motion under Rule 60(b) F.R.C.P. to vacate the dismissal, *West* v. *Gilbert*, 361 F.2d 314 (2 Cir., 1966).

a court order despite the patient efforts of Judge Owen to accommodate counsel's stated difficulties, all of which could have been foreseen.

(2) In the Light of *National Hockey League* v. *Met. Hockey Club*, 427 U.S. 639 (1976), the Court of Appeals Exceeded Its Limited Authority to Review the District Court's Discretionary Dismissal by Making Its Own Findings as to the Foreseeability of Respondent's Medical Complications.

The scope of the authority vested in the Court of Appeals to review a discretionary dismissal was recently considered by this Court in *National Hockey League* v. *Met. Hockey Club*, 427 U.S. 639 (1976). There, the Court of Appeals had reversed the District Court's dismissal for failure to timely answer written interrogatories under Rule 37(b)(2) F.R.C.P. In summarily reinstating the District Court's dismissal, this Court posed the issue as follows, p. 642:

> "The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing."

As the Court further went on to note, again at p. 642:

> "There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order."

The Court then explained the rationale of its decision at p. 643:

> "But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent."

Applying these principles to the present case, it is clear that the Court of Appeals did, in fact, substitute its judgment and, indeed, its findings for those of the District Court and thereby exceeded its limited reviewing authority. Purportedly distinguishing the authorities on which Judge Owen relied, *Michelsen* v. *Moore-McCormack Lines*, 429 F.2d 394 (2 Cir., 1970); *Davis* v. *United Fruit Co.*, 402 F.2d 328 (1968), *cert. denied*, 393 U.S. 1085 (1969), and *Lamb* v. *Globe Seaways Inc.*, 516 F.2d 1352 (2 Cir., 1975), the Court of Appeals noted that in those cases, where plaintiffs were not longshoremen but seamen, ". . . the probability that plaintiff would be at sea when the District Court would call his case for trial is foreseeable" (A. 5a).* However, if foreseeability is the test to be applied, the Court of Appeals overlooked the fact that Respondent's condition had been "worsening during the past six months" (A. 16a), a situation of which he and his counsel were, or should have been, well aware. This very point was raised by Judge Owen when he noted, "Apparently there has been no effort by Mr. Heller to keep track of his client in the intervening six or eight or twelve weeks, . . ." (A. 19a), following the pre-trial conference of December 6, 1976.

The effect of the Court of Appeals' reversal in this action is to invite, in future cases, the type of undesirable

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* Apparently, the Court of Appeals was willing to extend a greater measure of solicitude to a longshoreman than to a seaman, the traditional ward of the Court.

result sought to be avoided by this Court in *National Hockey League* v. *Met. Hockey Club,* 427 U.S. at 643. The ability of a District Judge to control his own calendar will be seriously undermined and subject to events which should be foreseen by counsel. Therefore, review of the Court of Appeals' holding is necessary to reaffirm the discretionary authority reposed in the District Court. See, *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501 (1947).

Petitioner submits that the Court of Appeals in this case exceeded its authority to review a discretionary order as defined by Judge Haney in *Delno* v. *Market St. Ry.,* 124 F.2d 965 (9 Cir., 1942), where he held at p. 967, that such discretion:

> ". . . is abused when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion."

Perhaps the most succinct expression of how a Court of Appeals should handle a discretionary order was uttered by Judge Frank in *Ford Motor Co.* v. *Ryan,* 183 F.2d 329 (2 Cir., 1950), when he stated at p. 331:

> "At best, the Judge must guess and we should accept his guess unless it is too wild."

In dismissing Respondent's complaint, Judge Owen relied, primarily, on *Michelsen* v. *Moore-McCormack Lines, Inc.,* 429 F.2d 394 (2 Cir., 1970) which, in turn, had cited *Link* v. *Wabash Railroad Co., supra.* In *Michelsen,* the District Court denied a last-minute application for a continuance based upon the unavailability of plaintiff, a seaman, and of his medical expert, who was ill. The trial judge directed plaintiff's attorney to proceed, using the deposition of plaintiff previously taken by opposing counsel. When plaintiff's attorney refused, the case was dismissed. In affirming, the Court of Appeals held, 429 F.2d at 396:

> "It is precisely because plaintiff's case was 'not presented at all' that we affirm Judge MacMahon's dismissal of plaintiff's action. Plaintiff's counsel refused to proceed with the plaintiff's deposition. In addition to plaintiff's deposition, counsel presumably had other evidence in the form of ship's records and hospital records."

Commenting further on counsel's refusal to comply with the court order to commence trial, the Court of Appeals continued, again at p. 396:

> "As plaintiff's counsel would not go forward with the evidence which he had, we are not confronted with the question of whether or not it would have been an abuse of discretion if, after introduction of the available evidence, Judge MacMahon had refused to grant an adjournment to the following Monday to receive Dr. Wally's testimony."

In reversing the dismissal of the present case, the Court of Appeals stated that *Michelsen* and other authorities cited by Judge Owen were not in point since they all involved seamen plaintiffs whose unavailability at the time of trial was foreseeable and counsel should have preserved their testimony. The Court of Appeals then indicated that the reason this Respondent was unable to attend on the trial date was his *unforeseen* medical complications. However, as shown earlier, p. 9, *supra,* Respondent's medical

problems were, in reality, quite foreseeable and yet, as pointed out by Judge Owen, counsel never attempted to ascertain his client's availability between the pre-trial conference of December 6, 1976 and February 16, 1977, when the trial date was set with the consent of counsel.

The Court of Appeals, further commenting on the authorities cited by Judge Owen, stated:

> "We have not been cited to any decision which holds that a supervising illness falls within the rationale of the cases cited by the District Court. The possibility that the plaintiff might die, if compelled to attend, makes this a different case" (A. 6a).*

Petitioner respectfully commends to this Court the decision of the Court of Appeals for the Second Circuit in *Morrissey* v. *National Maritime Union of America,* 544 F.2d 19 (2 Cir., 1976). There, a union member brought suit against his union and certain of its officials, including one Curran who became seriously ill shortly before the trial date. That defendant's application for a continuance was denied by the trial judge and, following judgment for plaintiff, the issue of abuse of discretion was raised on appeal. Among the points considered was the contention that the particular defendant should not have been obliged to proceed on the basis of his deposition previously taken by opposing counsel. In explaining its affirmance, the Court of Appeals stated, 544 F.2d at 32:

> "Our principal reason is that, as the judge said, 'at no time did counsel make an offer of proof concerning

* We are told by the Court of Appeals that this was a "supervening illness" and an "unforeseen medical complication" yet Respondent claims that it is the direct result of the accident in suit (A. 9a).

> what material testimony, prejudicial by its absence, Curran might give in person,' 397 F. Supp. at 688."

The Court later went on to say, again at p. 32:

> "While we do not accept the general proposition that a lawyer's failure to depose his own client, rather than have him subjected only to the opponent's discovery, is an absolute bar to a request for a continuance in the event of the client's unexpected serious illness, here the discovery deposition seems to have covered the very topics on which Curran's live testimony presumably would have been most helpful to the defense."

At the hearing of February 23, Judge Owen specifically asked Respondent's counsel in what respect the existing deposition of his client was insufficient (A. 14a). Respondent's counsel merely stated that it was not a full and complete deposition and made no attempt to specify what material testimony, prejudicial by its absence, Respondent might give in person. Thus, as in *Morrissey,* counsel here was afforded an opportunity to make an offer of proof in support of his claim of prejudice and failed to do so. Petitioner submits that, in the light of the holding in *Morrissey,* the "foreseeability" test loses its significance if counsel fails to demonstrate how the deposition of his client, taken by an adversary, is, in fact, inadequate.

Respondent's counsel, in refusing to proceed to trial as directed by Judge Owen, acted knowingly and willfully as that term is defined in *Welsh* v. *Automatic Poultry Feeder Co.,* 439 F.2d 95 (8 Cir., 1971). There the Court stated at p. 97:

> "Willful as used in the context of a failure to comply with a court order or failure to prosecute implies a conscious or intentional failure to act, as distin-

guished from accidental or involuntary non-compliance and no wrongful intent need generally be shown."

Judge Owen acted well within his acknowledged discretion in dismissing the complaint and the Court of Appeals exceeded its limited authority when, in reversing, it substituted its own judgment and findings of fact as to foreseeability for those of the District Court, as proscribed by *National Hockey League* v. *Met. Hockey Club*, 427 U.S. 639 (1976).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari herein should be granted.

June 19, 1978

THOMAS F. MOLANPHY
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New York, New York 10004
Attorney for Petitioner

APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 547, 548—September Term, 1977.

(Argued January 20, 1978 Decided March 31, 1978.)

Docket Nos. 77-7413, 77-7450

MIQUEAS TEN,

Plaintiff-Appellant,

—against—

SVENSKA ORIENT LINEN,

Defendant and Third-Party Plaintiff-Appellee-Appellant,

—against—

NACIREMA OPERATING CO., INC.,

Third-Party Defendant-Appellee.

Before:

SMITH, MOORE and GURFEIN,

Circuit Judges.

Appeal from an order dismissing a longshoreman's complaint for failure to prosecute entered by the District Court for the Southern District of New York (Owen, *D.J.*). The Court of Appeals held that the complaint should be reinstated because the plaintiff's unavailability for trial was due to unexpected medical complications.

Reversed.

KENNETH HELLER, New York, N.Y., *for Plaintiff-Appellant.*

HAIGHT, GARDNER, POOR & HAVENS, New York, N.Y. (Thomas F. Molanphy, New York, N.Y., of counsel), *for Defendant and Third-Party Plaintiff-Appellee-Appellant.*

PER CURIAM:

This is an appeal from the dismissal of a complaint by a longshoreman against a shipowner and employer for failure to prosecute. The District Court also denied appellant's motion under Rule 60(b), F.R.C.P., to vacate the dismissal. We reverse.

The plaintiff originally brought an action in the New York Supreme Court to recover damages for injuries which he sustained on September 12, 1972, while working as a longshoreman in the employ of Nacirema Operating Co., Inc. aboard defendant-appellee's M/S LAKE EYRE. The action was removed to the United States District Court by petition dated November 14, 1972. A motion to remand was denied and plaintiff's employer was impleaded. On February 23, 1977—some four and a half years later—the action was dismissed by the District Court for failure to prosecute in the following circumstances.

On December 6, 1976, a third pretrial conference was held. During the week of February 15, 1977, a pretrial order was prepared by Magistrate Raby which plaintiff's counsel refused to sign, but which was, nevertheless, signed by the Court upon recommendation of the Magistrate. Trial was set during that week for February 23, 1977.

A representative of plaintiff's counsel agreed to the date for trial and the defendant shipowner sent for a mate of the LAKE EYRE who was in Saudi Arabia. A deposition of the plaintiff had been taken by the defendant, but no deposition had been taken of the plaintiff by his own counsel (who contended that the medical condition of the plaintiff had worsened considerably since the adversary deposition had been taken in December 1974).

There is no doubt that plaintiff's counsel, in his argument before the District Court seeking a continuance, was brash and almost, but not quite, contemptuous. In pressing his argument with vigor, however, he was protecting his client's interest and we must view the facts objectively.

The plaintiff, allegedly as a result of the accident, has been totally disabled since February 8, 1973. Being unable to work, he returned to his native Puerto Rico to live. During the six months preceding the trial date, he was on standby ready to come to New York for the trial. Counsel was in touch with his wife through a delayed procedure of a notice to call, since the plaintiff did not have a telephone in his home.

Though plaintiff's counsel had indicated during the week of February 15, 1977 that plaintiff would be ready for travel, an unexpected medical event occurred thereafter. On February 17, 1977, plaintiff was hospitalized for conditions including thrombo-phlebitis and cellulitis, and on Saturday, February 19, 1977, was transferred to the Aguirre Hospital from the Santa Rosa Hospital which had no emergency facilities. The diagnosis at Santa Rosa Hospital was "acute heart failure with AV Block". Dr. Frank Bellaflores, Medical Director of Aguirre Hospital, found "chronic thromboflebitis," "arteriosclerotic heart disease

with premature heart beat," and "pulmonary congestion". The formal diagnoses were:

"1) Arteriosclerotic heart disease with cardiomegally

"2) Ischemic heart disease

"3) Bilateral apical plural thickening and adhesion with bullse in Rt. appex [sic]

"4) Cellulitis with chronic thromboflebitis on left leg

"5) Chronic active genito urinary infection"

The medical orders were that the patient could not leave the hospital in less than two weeks, and that he was to be referred to Ponce Medical Service for specialized pulmonary and cardiac evaluation. The patient was not to be allowed to travel for at least two months.

When plaintiff's counsel got the news of Ten's hospitalization from Mrs. Ten on Saturday, February 19, 1977, he immediately notified defendant's counsel by telephone. Defendant's counsel stated that he believed its witness had alrady left Saudi Arabia in order to testify at the trial set for February 23.

On Wednesday, February 23, when the case was called, plaintiff's counsel asked for an adjournment to permit him to proceed to Puerto Rico "after the plaintiff has been released from hospital care, because his condition is described as serious, [and take] his deposition with regard to presentation of a plaintiff's case and not a defendant's case. Following the taking of this deposition . . . the case [would] then proceed to trial."

The court, proceeding on the assumption that the plaintiff could not have come to New York anyway, on the representation that counsel's office had notified the court

it would be ready, and on the fact that the defendant had already gone to the expense of bringing the mate from Saudi Arabia, rejected the possibility of an adjournment. He ordered counsel to proceed to trial immediately, and indicated that he would grant a long weekend recess, which would provide time for plaintiff's wife to travel to New York.

When plaintiff's counsel persisted in his refusal to go to trial, the court dismissed the case on the authority of *Michelsen* v. *Moore-McCormack Lines*, 429 F.2d 394 (2d Cir. 1970). In the course of the oral discussion, the court also cited as authority for dismissal *Davis* v. *United Fruit Co.*, 402 F.2d 328 (1968), *cert. denied*, 393 U.S. 1085 (1969), and *Lamb* v. *Globe Seaways, Inc.*, 516 F.2d 1352 (2d Cir. 1975).

The court apparently felt that it was free to exercise its discretion to dismiss the action on the basis of those precedents. This was an erroneous view of the authority of those cases. Those cases involved seamen, who by the nature of their calling, would be likely to be at sea and unavailable for trial since District Court calendars move in unexpected ways. In such situations, the probability that plaintiff would be at sea when the District Court would call his case for trial is foreseeable. Hence, we have noted that a deposition of plaintiff should be taken by his own counsel as a protective measure.

Here we are dealing with a land-based longshoreman who ordinarily could have flown from Puerto Rico to New York in several hours. The anticipation of his unavailability would, in practical terms, hardly be greater than if he lived in Chicago. The cause of his inability to attend was not that he was at sea or that he lived in Puerto Rico,

but that he had become acutely and dangerously ill just before the trial was to begin. We have not been cited to any decision which holds that a supervening illness falls within the rationale of the cases cited by the District Court. The possibility that the plaintiff might die, if compelled to attend, makes this a different case.

The offer of plaintiff's counsel to take plaintiff's deposition after he could leave the hospital was quite a reasonable compromise, in view of the unexpected medical development. On the oral argument, moreover, plaintiff's counsel offered to pay whatever expenses the defendant incurred in having brought its witness from Saudi Arabia. We make this, as well as the reimbursement of defendant's costs in attending the deposition in Puerto Rico, conditions for reinstating the complaint, and reverse the order dismissing the complaint for failure to prosecute.

Hearing Before the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[1] 72 Civ. 4913

MIQUEAS TEN,

Plaintiff,

vs.

SVENSKA ORIENT LINEN & GARCIA & DIAZ, INC.,

Defendant,

vs.

NACIREMA OPERATING CO.,

Third Party Defendant.

Before:

HON. RICHARD OWEN,

U.S.D.J.

New York, February 23, 1977;
10:00 A.M.

APPEARANCES:

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Attorney for the Plaintiff.

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Attorneys for Defendant;

BY: Thomas F. Molanphy, Esq.,
and
Richard Matanle, Esq., *of Counsel.*

[2]

SEMEL, MCLAUGHLIN & BOECKMANN, ESQS.,
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Attorneys for Third Party Defendant;

BY: John M. Dellicarpini, Esq., *of Counsel.*

[3] (In the robing room.)

The Court: Mr. Heller, I have your supplemental affidavit.

Mr. Heller: I didn't bring the first one with me. Unfortunately, my office door was jammed this morning, and I couldn't even get in. Thank God I had that last night, you know.

The Court: When did your client first get hospitalized?

Mr. Heller: He was first hospitalized on Saturday, as is stated in the other affidavit.

The Court: He was in another hospital before that. Where was he, according to this?

Mr. Heller: He was transferred to this hospital on Friday. He may have been hospitalized a short while before that, a couple of hours, probably.

You see, as I explained to the Court before, talking to the plaintiff's wife in the Guyama District in Puerto Rico

where she does not have a phone, where she is a great distance from the phone, it is not easy. Not only can't I get in touch with her, I have to call her in some kind of a notice house, I don't know the distance even, and then she sometimes is never able to call me back; and then if I do even speak to her on the phone, [4] the telephone circuit gets obliterated. So it's rather difficult to talk to her.

I left word again yesterday for her to call me back, and as of today she hasn't, because somebody is supposed to take her the message, or whether she is supposed to come in, I don't know, but she is currently residing—

The Court: Well, let me stick with this point: The first you heard of the plaintiff's illness was on Saturday?

Mr. Heller: Saturday at 2.00 p.m.

The Court: When did you make an effort to see to it he would be here today, because your office over a week ago when we put this case on the calendar, your office said to me, "Fine, but please don't put us on on Tuesday; we want Wednesday."

Mr. Heller: Well, we called Puerto Rico immediately—

The Court: This is when?

Mr. Heller: —and it took a day, practically, as I explained the situation, to call just about a day, for the wife to call us back and to inform us that her husband was ill. He had been ill with thrombophlebitis cellulitis, which resulted from his accident; for the past [5] six months his leg was fairly swollen—it has been swollen, it got worse, and she said that, "We have been trying to stay out of going to a hospital. We know if we go to a hospital he will be hospitalized because we are waiting for a call from you day by day since October that we will have to go to trial. We have been trying to stay out of the hospital, but he is so bad that he can't travel."

So I said, "Well, what are you going to do?"

And she says, "We have to do something."

Then I received a call then on Saturday, and when I received the call on Saturday—

The Court: Just let me be sure I understand what you said.

She told you during the week last week—

Mr. Heller: Yes, after the succeeding—.

The Court: Mr. Heller, hold up a minute.

If I understand you correctly, the wife told you during the last week that he could not travel?

Mr. Heller: He could not travel.

The Court: Then he couldn't have come up here anyway, is that correct?

Mr. Heller: I insisted. I said to the wife, "Please try to bring him here, please, because the Judge [6] has reserved this time for the trial."

We were making every effort to assist your Honor in your calendar difficulties, as all the judges have.

At that point—you remember what I was saying before, your Honor, that the telephone conversation there is very difficult. Sometimes the wire is obliterated. In between screaming on the telephone back and forth to her, she told me he has been ill; his condition is worsening.

I said, "Please use every effort to come to New York tomorrow, Saturday"—I think "tomorrow" was Friday and Saturday—and she said, "We will try."

She said, "We will look at his condition."

The next I heard was the telephone call on Saturday, I guess it was between one and two o'clock.

I called Mr. Molanphy's office. They gave me his phone number at home. I attempted to call him; first his number was busy, and then it was out, and I reached him at 5.00

p.m. on Saturday, your Honor, and I informed him of the plaintiff's condition, that he had been hospitalized.

At that time she could only describe to me on the phone that his leg was swollen.

[7] Now, pursuant to your Honor's request I made the succeeding phone calls to the hospital, located the doctor, found the doctor, found these conditions as I have set forth in there, found the prognosis, and found all of this information that your Honor asked for.

The plaintiff is now 67 years old, your Honor, and he has this condition of congestive heart failure, arteriosclerosis, premature ventriculation, aorta contractions, thrombophlebitis and cellulitis of his entire left leg, and a physician explained to me that it is a small hospital, and they try to get people out of the hospital, but he is guessing; he would like to reevaluate the condition in two weeks to determine whether he will continue as an in-patient or out-patient, and that no matter what time he is discharged the physician will not let him travel for reasons of his health for one to two months after he leaves the hospital. Otherwise it will endanger his life.

The Court (Addressing defense counsel): Now, have you seen this affidavit?

Mr. Molanphy: I haven't seen any affidavit.

The Court: This is an affidavit of Mr. Heller's dated 22 February, 1977.

Mr. Molanphy: I assume it is in support of [8] an adjournment application, your Honor—

The Court: Right.

Mr. Molanphy: —and as I told Mr. Heller on Saturday, we had already alerted, had started our witness in from Europe; that was the first we heard of it, that it would be prejudicial to the defendant if the case was adjourned at this time.

We did take the deposition of the plaintiff a couple of years ago.

I think if it's a choice of whether I have got to take a mate's deposition now for a trial at some time in the future, or whether Mr. Heller has to use the plaintiff's deposition now, I respectfully submit that the defendant should not be faulted because they were not involved in this need for an adjournment.

The Court: Well, let's go off the record.

(Discussion off the record.)

The Court: Mr. Heller has suggested an adjournment in order to get the plaintiff's wife up here and to take photographs.

That is your proposal?

Mr. Heller: Yes, your Honor.

In this way we will bring his condition up to date and we will take a deposition as the plaintiff takes [9] it, not as the defendant takes it, so he will be able to present his case.

Your Honor was a practicing attorney; your Honor knows the situation.

The Court: Now, I will tell you, for reasons that have to do with a certain problem with one of my youngsters I have to be off on Monday.

You have a witness who you wanted to be heard next week because he is away, is that right?

Mr. Heller: No—

The Court: You told us of a doctor—

Mr. Heller: A doctor?

The Court: —that you said could not be here next week and it would have to be taken next Monday. That was told to me as the reason for starting, among other reasons, for starting on Wednesday.

Mr. Heller: My associate must have mentioned that, but that's not the problem. The problem now is the plaintiff. I will try the case without the doctor if need be.

The Court: What I am going to do, I am going to start the case today, and when we have taken all the proof of everybody's, we will recess until Tuesday.

Mr. Heller: I don't have anybody to present, [10] your Honor.

The Court: And over the weekend—well, we have the deposition of the plaintiff.

Mr. Heller: At this point, your Honor, I must put on the record that I cannot proceed with the case today, your Honor. I cannot proceed.

The Court: We are going to proceed, and over the weekend you may take these photographs; you may get the wife up here; you prepared, I assume, to bear the expense of sending the plaintiff up, you can send up the wife; you can take the pictures that you say you wanted to take; we will take her testimony on Tuesday.

The problem, Mr. Heller, that I have is that it would appear that even before this hospitalization your client was not in a position to come here because you told me that.

From reading this affidavit, that I better make a part of the court's record—you may read it but I am going to make it a part of the court's record.

(Affidavit of Mr. Heller dated February 22, 1977, marked Court's Exhibit 1.)

The Court: I have a clear feeling here that Mr. Ten is never going to be able to come here—

Mr. Heller: May I go on the record when you [11] finish, your Honor?

The Court: Yes.

—and the defendants have brought a man here from Europe at substantial expense in a situation where you weren't in a position to bring your plaintiff here anyway last week. So I feel that it is utterly inequitable to them, having underwritten this expense, and your plaintiff not having been able to come here even if he weren't in the hospital, to waste that expense and send him back.

So under all of these circumstances it seems to me that the way to proceed is to accept your suggestion, which is that the wife come here with the photographs, and you proceed as a deposition or two depositions, I am told.

Is there one or two of the plaintiffs?

Mr. Molanphy: One, your Honor.

The Court: One deposition of the plaintiff, and proceed on that basis.

Mr. Heller: May I go on the record now?

The Court: You may.

Mr. Heller: It is the plaintiff's position that the plaintiff cannot and will not proceed to trial at this time because the deposition taken of the plaintiff [12] by defendant is not a complete deposition; it does not reflect the plaintiff's case in full and complete anud true light and will substantially prejudice the plaintiff's case becarse—

The Court: Let me stop you.

In what way does it not present the plaintiff's case? Was he not asked questions about the nature of the injury and how it was caused to occur?

Mr. Heller: Not fully and completely, your Honor.

In addition—may I, your Honor? May I go back on the record?

The Court: I mean, wasn't he asked the question: "How did you get hurt?"

Mr. Heller: That's only part of this case, your Honor.

A deposition taken by the defendant for the purpose of defendant's case is not a full and complete deposition and does not enable the plaintiff to present his case in full and proper light, and will severely prejudice the plaintiff's case, and the plaintiff asks for an adjournment to obtain the plaintiff's deposition so that the plaintiff may be able to present a full and complete case, and to prevent, or not to grant the plaintiff an adjournment until such time as his deposition [13] can be taken, is highly prejudicial to the plaintiff, and it appears to be callous disregard of equal justice to the plaintiff.

Now, the defendant has produced not parties but witnesses. Their deposition—and they are not plaintiffs—can be taken for the purpose of perpetuating the testimony.

The plaintiff has proposed here that the matter be adjourned until your deponent, plaintiff's attorney, proceeds to Puerto Rico after the plaintiff has been released from hospital care, because his condition is described as serious, takes his deposition with regard to presentation of a plaintiff's case and not a defendant's case.

Following the taking of his deposition, that the case then proceed to trial —and this is not a small case. This is a total disability case of a plaintiff resulting from an accident on the defendant's ship.

The plaintiff is entitled to his day in court and to equal justice—

The Court: I have heard the equal justice before. We are talking about facts here, and we are all aware of the principles of law.

I am still completely troubled by the fact [14] that you told me this morning that your plaintiff couldn't have come here anyway.

Mr. Heller: On the contrary, your Honor.

The Court: And your office last week notified me that you could start this trial on Wednesday.

Mr. Heller: On the contrary, your Honor.

May I for the record reflect that I did not find out because of the difficult conditions—you see, the plaintiff—

The Court: But you told me the wife told you last week that he couldn't come in.

Mr. Heller: Your Honor, may I—

The Court: But you are getting repetitious.

Mr. Heller: I don't want to argue with the Court on the record; I am here to protect the plaintiff.

May I point out that the plaintiff's condition has been worsening during the past six months, and that because of the plaintiff's physical condition, his age, they have moved, his wife and himself, from New York to Puerto Rico to preserve his life, and the communication system from here to Puerto Rico to where they reside—they have no phone; they live in the country—has been very difficult.

The plaintiff has been on day-to-day call, [15] and that means that your deponent has been on day-to-day call for the past six months. Your deponent could not bring the plaintiff up and keep him in his condition day-to-day for the past six months. He had to live in Puerto Rico to preserve his life.

Now at this point in time, immediately upon receiving the phone call, your deponent contacted him to ascertain the plaintiff's condition.

I think that it severely prejudices the plaintiff for this Court to attempt to force the plaintiff to commence this trial on a deposition taken by the defendant some three years ago, not reflecting any of the questions the plaintiff would be asked at the trial, not reflecting the causal connection—

The Court: Mr. Heller, your office has had this case on a standby basis for how long?

Mr. Heller: Seven months, your Honor.

The Court: Seven months.

Mr. Heller: Yes, your Honor.

The Court: And your office was notified at the beginning of last week that it was ready to reach you for trial, and your office announced that you were ready to go to trial.

Mr. Heller: That was Wednesday, your Honor.

[16] The Court: And your office asked if we could start Wednesday. They said, "Please don't start Tuesday; start Wednesday."

You come in this morning and you give me an affidavit which indicates this fellow is in dreadful shape with only the minimum expectation he is going to be able to travel, and you tell me that his wife tells you on the phone that he couldn't have come anyway.

Mr. Heller: On the contrary.

The Court: That is what you said to me this morning.

Mr. Heller: I did not. I wish your Honor would not twist any words—

The Court: I am not twisting—

Mr. Heller: —and you would treat the plaintiff with equal justice—

The Court: Mr. Heller, I will give you a chance to talk, but I will expect the same from you.

Mr. Heller: Thank you, your Honor. I appreciate it.

The Court: Now I asked you specifically, to make sure I understood you, if the wife had said he couldn't travel anyway.

Mr. Reporter, would you read that back to me [17] so that I am not proceeding on any misapprehension of what I was told?

(Portion of record referred to read as previously recorded.)

Mr. Heller: I don't understand what the Court is attempting to do. Is it attempting to twist some words or find an excuse?

I would like it reflected on the record that I don't understand the Court's attempt here. I mean, at this point in time we have a man here who is severely ill. Is it the Court's intent here to force the plaintiff to proceed to trial in a court where the plaintiff will receive less than equal justice?

The Court: I am also a little bit troubled by the fact that your office tells me that you have to carry the case over to Monday for a certain doctor who is unavailable and now you tell me that you don't have any such doctor.

Mr. Heller: I didn't tell you I didn't have any such doctor, your Honor. Again you are attempting to twist some words—

The Court: What did you tell me?

Mr. Heller: I feel that the Court—

The Court: What did you tell me about a doctor?

[18] Mr. Heller: I didn't tell you anything about a doctor.

I told you right now that I want to try this case with the plaintiff, and I am entitled to try it. This is a serious case. It is a total disability case, and I will not be wiped out in front of a jury by any attempt to give the plaintiff less than equal justice, which it appears that this Court is attempting to do.

The Court: I will excuse you gentlemen.

Thank you very much.

(Recess.)

The Court: Mr. Heller is going to communicate with his client, but he himself has rejected your offer. Pursuant to the canons of ethics he says he has to communicate with the plaintiff's wife.

Mr. Heller: I have to.

The Court: Upon review of the entire record, and having read and considered Davis v. United Fruit, 402 Fed. 2d 328; Lamb v. Globe Seaways, 516 Fed. 2d 1352, and Michelsen v. Moore-MacCormack, 429 Fed. 2d 394, those cases as applied to the facts here make it, in my judgment, not only not an abuse of discretion to proceed but make it eminently the fair thing under all the circumstances, and therefore I am gong to proceed to [19] trial.

We will pick a jury at 10 o'clock tomorrow morning, which will give Mr. Heller time to collect his thoughts which apparently at this point need a little bit of collecting.

The basis for my determination to go ahead is as follows:

In December of 1976 Mr. Heller was told in a status report that the case would be ready for trial somewhere in the first three weeks of February, and the case was placed on our February list, and we just about met that commitment.

At that time there was no demurrer to that calendar date. Apparently there has been no effort by Mr. Heller to keep track of his client in the intervening six or eight or twelve weeks, because it appears, from what I am told this morning that it developed apparently some time earlier that Mr. Ten, the plaintiff, could not have come here anyway, his wife tell us; so that the mere fact that hospitalization over the weekend is surplusage on that. I mean, if he couldn't have traveled to start with, it really doesn't make any difference that he is in the hospital. He couldn't have appeared anyway. And, as a matter of fact, the likelihood [20] of his ever being able to travel is speculative.

In any event, when the case was called for trial last week, which, as I say, we were told it could be tried, and my chambers was told rather than starting on Tuesday, which was yesterday, would we please start today because of the requirement of getting the plaintiff here, and we were also asked if the case could be continued over to Monday because of the unavailability of a doctor during this week, and the Court agreed to do that and to take the doctor out of turn on Monday.

Now it appears in the meantime that Mr. Heller called Mr. Molanphy on Saturday at 5 in the afternoon to say that his plaintiff was in the hospital and he was going to ask for an adjournment, and at that point the defendants already had somebody, I gather, on a plane or actually here, Mr. Molanphy?

Mr. Molanphy: We believed at that time that he was enroute, yes, sir.

The Court: He was enroute from Saudi-Arabia as a witness.

This is the mate on the vessel?

Mr. Molanphy: Yes, your Honor.

The Court: The mate on the vessel at the time of the claimed accident was already enroute from Saudi- [21] Arabia to the United States, and he is now here and is ready to testify.

There is a deposition of the plaintiff which may be used, and while the cases which I have cited have made consideration of the fact that plaintiffs' laywers in these circumstances have raised appellate issues that using the deposition does not present their case "in its best light," this is a factor that in the balance the courts have not felt were sufficient in and of itself to require an adjournment of the case.

Also I have advised the parties that since I cannot sit on Monday, and that over the weekend Mr. Heller may arrange to bring Mrs. Ten here from Puerto Rico, as he suggested he would want to do, bringing with her appropriate, I am sure, colored photographs of the plaintiff's leg or such other part as he wishes to put in the photographs dealing with the disability at that time, but these photographs will be brought, and so she will be taken out of turn on Tuesday if she is here to testify.

Mr. Heller: May I go on the record, your Honor?

The Court: Given the foregoing we will start picking a jury at 10 o'clock tomorrow morning, on [22] Thursday.

Mr. Heller: May I go on the record, your Honor?

The Court: You may.

Mr. Heller: May I have the Court's permission to go on the record?

The Court: Yes.

Mr. Heller: First of all, I read two of the cases that the Court cites; I haven't read the third one; but I have read Judge Oakes' dissent in Lamb.

This case does not fit the areas of two of the cases cited by the Court, in that the plaintiff is not a seaman, and that he was not on a vessel; and also that when he was informed—the plaintiff, meaning your deponent, was informed of the plaintiff's physical condition just recently in December.

The plaintiff was able at great effort to travel. His condition has constantly worsened because of the delay in the calendar.

In addition, I did not say, and the Court either misunderstood me or misconstrued my words, I did not say that I would bring Mrs. Ten this weekend. I said Mrs. Ten is married to Mr. Ten for 45 years, and she will not leave him until his condition becomes [23] stabilized.

Now, I also note that the plaintiff will not proceed to trial, and I am informing the Court of that, without the plaintiff's complete deposition taken by the plaintiff and not relying on the deposition taken by the defendant.

Now, insofar as the offer of $10,000 is concerned, I feel that this offer is very much less than the plaintiff would be entitled to at the time of trial, and I feel that both the Court and defendant are using the plaintiff's physical condition for the purpose of attempting to pressure the plaintiff to settle this case—

The Court: I am not attempting that at all, and please—

Mr. Heller: Pardon me, your Honor—

The Court: Please, you pardon me, because you are not going to attribute anything to me of that kind whatsoever, and I resent the fact that you have done it—

Mr. Heller: I didn't interrupt the Court—

The Court: Now, look, counsel—

Mr. Heller: It is my understanding—

The Court: Counsel, when I am talking you be [24] quiet and you don't keep butting in.

You have attributed a statement to me that I am attempting to use this situation to pressure you to take a settlement. I am not doing any such thing. You are not to attribute anything to me, and I am saying to you, counsel, that I am making the suggestion that perhaps the case can be settled. If the case cannot be settled there is going to be a trial unless, as you have made a statement here, you have no intention of proceeding to trial absent the desire to accept a settlement, but you are not to attribute to me anything of that kind.

Mr. Heller: May I go on the record?

The Court: You may go on the record, and take care of the subjects that you discuss.

Mr. Heller: I think I am entitled here on the record to protect the plaintiff from receiving what I called and I have said before less than equal justice at the hands of this Court—

The Court: All right, you made your point. I don't need to listen to anything more. Your exception is noted to the Court's ruling. I do not wish to hear any more. You are getting repetitious.

Mr. Heller: Is it my understanding that the Court is foreclosing the plaintiff from protecting his [25] interest on the record?

The Court: Whatever you wish to say on the record in regard to the Court's ruling other than the fact that you take exception to it.

Mr. Heller: I say that the plaintiff will not proceed to trial, I want the Court to know that, but I will communicate and attempt to communicate this offer to Mrs. Ten, but I again must point out the communication difficulties. There is no way to get a telegram—

The Court: Counsel, let me say this to you:

Are you telling me now that you are not going to proceed tomorrow?

Mr. Heller: Yes, your Honor. I mean this—

The Court: Then I dismiss the case on the authority of Michelsen v. Moore-MacCormack Lines.

Mr. Heller: I am again pointing out that I cannot communicate this offer to the plaintiff—

The Court: That's a problem that you have to face, counsel.

The case is dismissed for failure to prosecute.

Mr. Molanphy: Thank you, your Honor.

District Court Memorandum Opinion of March 30, 1977

While noting that the transcript of the proceedings on February 23, 1977 appears to be inappropriately truncated and counsel's affidavit does not fairly reflect its tenure, I further note that the action is now before the Court of Appeals and I am without jurisdiction to act. The motion is denied.

3/30/77 Richard Owen
USDJ

Memorandum and Order of the District Court of July 20, 1977

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 4913

MIQUEAS TEN,

Plaintiff,

—against—

SVENSKA ORIENT LINEN,

Defendant and Third Party Plaintiff,

—against—

NACIREMA OPERATING CO., INC.,

Third Party Defendant.

OWEN, *District Judge:*

I am in receipt of a "supplemental affidavit" of Kenneth Heller verified June 8, 1977, containing certain exhibits, including a handwritten, unverified statement by the wife of the plaintiff. The affidavit seeks to be in support of a motion which was, however, previously denied by me on March 30, 1977. Treating the June 8th "supplemental affidavit" as an application to reargue, it is untimely.

Notwithstanding the foregoing, I have reviewed the affidavit in the light of the transcript of proceedings before me on February 23, 1977, at which time, various options were not only offered to, but also suggested by, Mr. Heller

Memorandum and Order of the District Court of July 20, 1977

to preserve his proof, including the taking of his client's *further* deposition during a recess the Court was prepared to grant during the trial. These various options were regrettably all rejected by Mr. Heller out of hand, which together with a refusal to proceed, left the court no alternative but to dismiss for failure to prosecute.

Consequently, on the basis of the transcript of February 23, 1977, even were the application to reargue timely, I find no basis to disturb the determination of that day. The application to reargue is denied.

So Ordered.

July 19, 1977.

RICHARD OWEN
United States District Judge

Rule 41(b) F.R.C.P.

Rule 41. Dismissal of Actions.

• • • • •

(b) INVOLUNTARY DISMISSAL: EFFECT THEREOF. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Docket Sheet Entries

DATE	PROCEEDINGS
11–17–72	Filed petition for removal from the Supreme Court of New York County.
11–17–72	Filed undertaking for removal bond no. 2412575 in the sum of $500.00.
1–17–73	Filed pltffs Miqueas Ten demand for a jury trial.
3–19–73	Filed defts notice that pltff will be examined before trial pursuant to Rule 26 et seq. of the FRCP on April 11th, 1973.
3–19–73	Filed interrogatories by deft to the pltff.
3–19–73	Filed answer of deft to the complaint.
4–13–73	Filed pltff's notice of motion re: remand action to Supreme Court, N.Y. ret: 4-23-73.
4–13–73	Filed pltff's memorandum of law in support of the motion to remand this matter to the Supreme Court of the State of New York, etc.
4–19–73	Filed Defts affdvt in opposition to pltffs motion to remand action to the Supreme Court of the State of NY, County of NY.
4–19–73	Filed Defts memorandum of law in support.
5–24–73	Filed pltf's reply affidavit to deft's affidavit in opposition to pltf's motion to remand.
5–17–73	Filed Memo End on motion filed Apr 13-73. • • • The motion to remand is denied and the complaint is dismissed as to Diaz only, without costs, and it is dropped as a party deft. So Ordered, Brieant, J.

Docket Sheet Entries

DATE	PROCEEDINGS
9–14–73	Filed notice of motion permitting deft. to make Nacirema Operating a 3rd pty. deft.
11–13–73	Filed memo endorsed on deft's motion filed 9-14-73. Motion permitting the filing of a 3rd pty complaint is granted—No opposition—So ordered—Brieant, J.M.N.
11–19–73	Filed 3rd pty complaint and issued 3rd pty summons.
12–13–73	Filed 3rd pty summons return, served 3rd pty deft by M. Carrol. 12-4-73.
1–22–74	Mailed notice of reassignment.
1–30–74	Before Owen, J.
2– 1–74	Filed deft & 3rd pty pltff Notice of Motion. Re: Direct pltff to supply certain items of discovery & granting relief, ret. 2/15/74.
2– 1–74	Filed deft & 3rd pty pltff Memorandum of Law in support of motion for discovery.
2–15–74	Filed 3rd pty deft Answer with counterclaim.
2–15–74	Filed 3rd pty deft Interrogs.
2–15–74	Filed 3rd pty deft Request for documents under rule 34.
2–15–74	Filed 3rd pty deft Notice to take deposition of pltff & 3rd pty pltff on 3/7/74.
3– 5–74	Filed Pltffs Affirmation.
3–14–74	Filed affidavit by Thomas F. Molanphy in reply to the affidavit of pltff.

Docket Sheet Entries

DATE	PROCEEDINGS
3–14–74	Filed Memo end on motion dated 2/1/74. Motion is granted, etc. Owen, J. (mailed notice).
4–10–74	Filed Stip & Order that the time for deft. & 3rd pty pltffs to answer to counterclaims is extended to 4/29/74, Owen, J.
7– 1–74	Pretrial hearing, Owen, J.
7–19–74	Filed Deft & 3rd pty pltff Interrogs to 3rd pty deft.
11–22–74	PTC —— Owen, J.
11–25–74	Filed pltff's answers to interrogs.
12–13–74	Filed deft 3rd pty pltff's affdvt & notice of motion to compel answers to interrogs. Ret. 1-3-75.
12–13–74	Filed deft 3rd pty pltff's memorandum in support of motion to compel answers.
2– 6–75	Filed Pltffs Reply Affirmation.
2– 6–75	Filed Pltffs Affirmation.
2–13–75	Filed memo endorsed on motion filed 12/13/74—Pltff shall answer the interrogs. as indicated. Pltff shall have 2 weeks from service of a copy of this order within which to furnish deft with the required answers. So Ordered—Owen, J. Mailed notices.
3– 4–75	Filed 3rd pty deft's affdvt & notice of motion to dismiss (Rule 37)—Ret. 3/14/75.
3– 4–75	Filed 3rd pty deft's request for documents under Rule 34.

Docket Sheet Entries

DATE	PROCEEDINGS
3– 4–75	Filed 3rd pty deft's memorandum of law in support of motion to dismiss.
3–13–75	Filed pltff's affirmation in opposition to motion to dismiss.
4–17–75	Filed pltff's further answers to interrogs.
4–18–75	Filed pltff's answers to interrogs.
7–31–75	Filed third party defts request for production of documents, etc. from pltff.
9– 8–75	Filed third party defts Affidavit & Notice of Motion for an order compelling pltff to produce and permit the third party deft to inspect and copy documents, etc. as indicated before Owen, J. on 9-12-75.
9–12–75	Filed affidavit & Notice of Motion by deft and third party pltff for an order compelling pltff to submit to a physical examination by the physician designated by deft, etc., as indicated rtble before Owen, J. on 9-26-75.
9–12–75	Filed memo of law of deft and third party pltff.
9–11–75	Filed Request of deft and third party pltff that third party deft Nacirema Operating Co. Inc. produce the documents, indicated.
10– 6–75	Filed Report of Mag. Raby to Owen, J.
11–10–75	Filed memo and order that the report of the Mag. (Raby) is made the order of this Court. Owen, J. M/N.

Docket Sheet Entries

DATE	PROCEEDINGS
12- 8-75	Filed Affidavit & Notice of motion by deft and third party pltff for an order precluding pltff from introducing at the trial of this action any medical proof of the injuries claimed to have been sustained, etc. as indicated rtble before Owen, J. on 12-19-75.
12- 8-75	Filed defts memorandum of law etc., as indicated.
12-17-75	Filed pltff's affidavit & notice of cross-motion to strike and terminate deft & 3rd pty deft right to a physical examination of pltff. ret. 12-19-75.
12-17-75	Filed pltff's memorandum of law in support of cross-motion.
1- 7-76	Filed deft's affidavit in opposition to pltff's motion to strike 3rd pty pltff's rights to a physical examination of pltff.
1-14-76	Filed Memo End on deft's motion to preclude pltff from introducing medical proof. Motion Granted. Pltff is to pay the sum of $75 for wasted medical expense and $150 attorney's fees for a total of $225. Owen, J. (mailed notice).
1-14-76	Filed Memo End on pltff's cross-motion to strike deft's right to a physical examination of pltff. Motion denied. . . . Owen J. (mailed notice).
2- 9-76	Filed pltff's affidavit & Notice of Motion for reargument of cross-motion of , 1/14/76.
2-13-76	Filed deft & 3rd pty pltff's affidavit in opposition to pltff's motion to reargue.

Docket Sheet Entries

DATE	PROCEEDINGS
3-23-76	Filed pltff's reply affidavit in support of motion for reargument.
3-24-76	Filed Memo End on pltff's motion to reargument. The time for compliance shall commence on 3-7-76. The motion to reargue is denied. Owen, J. (mailed notice).
3-22-76	Pre-Trial Conference Held By: Owen, J.
3-31-76	Filed deft's supplementary interrogs. to pltff.
4- 8-76	Filed deft's affidavit & notice of motion for an order directing pltff to file answers to deft's supplemental interrogs. ret. 4/22/76.
4- 8-76	Filed deft's memorandum of law in support of motion to compel answers to supplemental interrogs.
4-14-76	Filed Memo End on deft's motion to compel answers to supplemental interrogs. Assigned to Mag. Raby to hear and report. Owen, J. (mailed notice).
4-20-74	Filed pltff's affidavit in opposition to deft's motion to compel answers to supplemental interrogs.
6-17-76	Filed duplicate original Report of Mag. Raby.
6-23-76	Filed pltff's affidavit and notice of motion to dismiss the answer and to compel discovery, ret. 7/1/76.
6-28-76	Filed deft & 3rd pty pltff's answering affidavit in opposition to pltff's motion to dismiss the answer.

Docket Sheet Entries

DATE	PROCEEDINGS
6–29–76	Filed Memo End on pltff's motion to dismiss the answer. Assigned to Mag. Raby to hear and report. Owen, J. (mailed notice).
6–30–76	Filed deft & 3rd pty pltff's affidavit in opposition to pltff's motion to compel discovery.
7– 2–76	Filed order assigning this case to Mag. Raby for pre-trial purposes. Owen, J. (mailed notice).
7– 6–76	Filed duplicate original Report of Mag. Raby.
7–14–76	Filed Memo End on report of Mag. Raby. The Magistrate's report is made the order of this Court. Owen, J. (mailed notice).
10–26–76	Filed affidavit and notice of motion to dismiss action.
12– 6–76	PTC held Owen, J.
12–17–76	Filed report of Magistrate Raby.
2– 8–77	PTC held Mag. Raby.
2–15–77	PTC held Mag. Raby.
3– 3–77	Filed notice of appeal to the USCA from the order of J. Owen dated 2/23/77 m/n.
3– 8–77	Filed notice of motion and affidavit for order withdrawing appeal to USCA. ret sine die.
3– –77	Filed memo end on motion dated 3/2/77. Motion denied. So ordered. Owen, J. m/n.
3–23–77	Filed pltffs affidavit and notice of motion to vacate the order made on the 23rd day of Feb. 1977 which dismissed the pltff's action for failure to prosecute under rule 41(b). ret. Mar, 1977.

Magistrate Raby's Letter of December 20, 1976

UNITED STATES MAGISTRATE
UNITED STATES DISTRICT COURT
United States Courthouse
Foley Square
New York, N. Y. 10007
791-0155

HAROLD J. RABY
Magistrate

December 20, 1976

Kenneth Heller, Esq.
277 Broadway
New York, New York 10007

Haight, Gardner, Poor & Havens, Esqs.
One State Street Plaza
New York, New York 10004

Re: MIQUEAS TEN v. SVENSKA ORIENT LINEN, et al.
72 Civ. 4913 (RO)

Gentlemen:

Judge Owen having directed me to supervise the preparation of a pre-trial order in connection with this case, which is now scheduled for trial in mid-February, 1977, this matter is accordingly scheduled for a conference to be held at my office, Room 610, at 11:00 A.M., on January 4, 1977, at which time counsel are required to be present.

Respectfully,

/s/ HAROLD J. RABY
HAROLD J. RABY
United States Magistrate

HJR:EKD

Report of Magistrate Raby of February 16, 1977

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 4913 (RO)

MIQUEAS TEN,

Plaintiff,

—v.—

SVENSKA ORIENT LINEN,

Defendant and Third Party Plaintiff,

—v.—

NACIREMA OPERATING CO., INC.,

Third Party Defendant.

To the Hon. Richard Owen, United States District Judge:

On December 20, 1976, you requested me to supervise the preparation of a pretrial order in this case. Pursuant to that direction, I sent a letter on that date scheduling a conference of counsel for January 4, 1977 to discuss the format of the pretrial order. That conference date was thereafter adjourned to January 25, 1977 at the request of Kenneth Heller, Esq., attorney for the plaintiff. On January 25, 1977, I instructed representatives of the plaintiff and the two separate defendants as to the proper format of a pretrial order, instructing counsel for said defendants to supply to counsel for plaintiff, for inclusion in the text of the pretrial order, the defendants' required "input",

consisting of their statements of contentions, witness lists and exhibits list. I then adjourned the matter for submission of the pretrial order on February 8th.

At the conference subsequently held on February 8th, plaintiff's representative, Mrs. Susan Harmon, advised me that Mr. Heller, counsel for plaintiff, had not received the required input from defendant Svenska, notwithstanding assurances by Mr. Molanphy, counsel for that defendant, that such input had in fact been mailed to Mr. Heller on January 28th. I thereupon directed that Mr. Molanphy hand deliver the said material to Mr. Heller (which was done the same day) and adjourned the matter until February 15th, 1977, for submission of pretrial order.

On February 15, 1977, plaintiff's representative, Mrs. Susan Harmon, appeared, as did counsel for the two defendants. She presented to me a proposed form of pretrial order which, however, was deficient in the following respects:

(1) It included certain purported stipulated facts as to which opposing counsel had not agreed;

(2) It failed to list the exhibits of the defendants.

In an effort to rectify this deficiency, I spent approximately an hour of my time endeavoring to modify and expand the text of the pretrial order to a degree where it would be mutually satisfactory to counsel as well as in conformity with the requirements of this Court insofar as content is concerned. When that process was completed, and counsel for the defendants had affixed their signatures on the order, Mrs. Harmon announced that it would be necessary for her to take the original order back to her

office to be signed by Mr. Heller, assuring me that it would be returned promptly.

The following day, however, Mr. Heller returned the pretrial order to me unsigned, indicating, in an accompanying letter, his reasons for not wishing to sign the order.

To the extent that his refusal to sign the order is predicated on his contention that there are exhibits listed by defendants in the pretrial order which he has not seen, I here record the representation in open court by defendants' counsel that counsel for the plaintiff is free to examine *any* of the exhibits so listed by them which he claims that he has not yet seen. To the extent that Mr. Heller desires to see documents *not* listed in the pretrial order as the condition of his signing the pretrial order, I need only point out my understanding that discovery in this 1972 case has already been closed by you.

Finally, to the extent that Mr. Heller objects to my having stricken from his list of witnesses the legend "longshore gang list and members", I feel that I am completely justified in so doing, since the purpose of a pretrial order is to identify specifically the witnesses that a party proposes to produce at the trial.

While I am troubled by Mr. Heller's refusal to sign the pretrial order, I believe that it is nevertheless in order for you to sign it; and I believe that in Mr. Heller's presentation of the case on behalf of plaintiff, he should be bound by the parameters of proof set forth in the order, particularly since the contentions therein appearing are precisely in the form prepared by Mr. Heller himself.

Copies of this Report have been mailed this date to counsel for the interested parties. Any objections hereto

should be filed at your Chambers not later than February 23rd, 1977, unless the time for so doing is extended by you.

Dated: New York, N.Y.
February 16, 1977.

Respectfully submitted,

HAROLD J. RABY
United States Magistrate

cc: KENNETH HELLER, Esq.
277 Broadway
New York, New York 10007

HAIGHT, GARDNER, POOR & HAVENS, Esqs.
One State Street Plaza
New York, New York 10004
Att: Thomas Molanphy, Esq.

SEMEL, MCLAUGHLIN AND BOECKMAN, Esqs.
10 Rockefeller Plaza
New York, New York 10020
Att: John Dellicarpini, Esq.

Affidavit of Respondent's Counsel

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MIQUEAS TEN,

Plaintiff,

—against—

SVENSKA ORIENT LINEN,

Defendant and Third-Party Plaintiff,

—against—

NACIREMA OPERATING CO.,

Third-Party Defendant.

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

KENNETH HELLER, being duly sworn, deposes and says:

1. I am the attorney for the plaintiff and have been in charge of this litigation since its inception, and am personally familiar with all the proceedings in this case and with the facts hereinafter stated.

2. On February 23, 1977, I appeared before the Hon. Judge Richard Owen of the United States District Court, Southern District, with Messrs. Molanphy and Matanle, Counsel for defendant and third-party plaintiff, and Mr. Dellicarpini, Counsel for third-party defendant, to request

an adjournment of the trial, scheduled to commence the same day, because of plaintiff's hospitalization and consequent inability to appear for his trial (p.3).

3. Plaintiff was hospitalized due to congestive heart failure, arteriosclerosis, premature ventriculation, aorta contractions, thrombophlebitis, and cellutitis of his entire left leg, (p.7). The latter condition, previously existing, had worsened to such an extent that it was the proximate cause of his hospitalization. As stated by counsel, plaintiff's condition would be reevaluated in two weeks, and plaintiff might be able to travel after one to two months (p.7).

4. The Court, in making its order stated at p.10:

> "The problem . . . that I have is that it would appear that even before this hospitalization your client was not in a position to come here . . . ."
>
> • • • • •
>
> "I have a clear feeling here that Mr. Ten is never going to be able to come here."

And, at p.19:

> ". . . it developed apparently some time earlier that Mr. Ten, the plaintiff, could not come here anyway, his wife tells us, so that the mere fact that hospitalization over the weekend is surplusage on that. I mean, if he couldn't have traveled to start with, it really doesn't make any difference that he is in the hospital. He couldn't have appeared anyway. And, as a matter of fact, the likelihood of his ever being able to travel is speculative."

The Court's conclusion that plaintiff was always unable to travel prior to February 23, 1977 and that he would probably never be able to travel was based on speculation, not fact, is not based on the available medical evidence (p.7), and is mistaken.

5. The Court, in making its order, stated at p.11:

> ". . . and the defendants have brought a man here from Europe at substantial expense."

And, at p.20-21:

> "He was enroute from Saudi Arabia as a witness. . . . The mate on the vessel at the time of the claimed accident was already enroute from Saudi Arabia to the United States and he is here now and is ready to testify."

In fact, Mr. Molanphy stated, with regards to this witness:

> ". . . we had already *alerted,* had started our witness in from Europe . . . ."

Mr. Molanphy indicates only that the witness was on standby—ready to come to the United States, if needed. He did not indicate anywhere that anything else had transpired—and he certainly did not indicate that the witness was already in the United States, as the judge mistakenly believed.

6. The Court cited the cases of *Davis* v. *United Fruit,* 402 F. 2d 328; *Lamb* v. *Globe Seaways,* 516 F. 2d 1352; and *Michelson* v. *Moore-McCormack Lines,* 429 F. 2d 394, as

authority requiring that this case proceed to trial without plaintiff's presence (p.18). As remarked by plaintiff's counsel, at p. 22, these cases are clearly distinguishable from the facts of this case. Furthermore, *Michelson* v. *Moore-McCormack Lines,* supra, is not authority for dismissing this case for failure to prosecute.

7. *Davis, Lamb,* and *Michelson,* supra, stand for the proposition that because it is clearly foreseeable that a plaintiff seaman might be away at sea when his case is called for trial, a judge, in the proper exercise of his discretion, may deny a continuance of the trial and dismiss for lack of prosecution, 402 F. 2d at 330, 516 F. 2d at 1353, and 429 F. 2d at 396.

They do not stand for the proposition that a judge, in proper exercise of his discretion, can deny a continuance and dismiss for failure to prosecute the case of a plaintiff seaman who is "in port" but unavailable to testify due to sudden illness or unexpected hospitalization, which are unforeseeable events.

Michelson is not authority to dismiss this case for failure to prosecute for the non-appearance of the plaintiff due to his hospitalization. Furthermore, Judge Owen's attempt to write his own record to indicate that plaintiff's counsel might have or should have had knowledge of plaintiff's inability to travel or hospitalization, one week prior to trial (pp. 5, 13-14, 16), or that plaintiff's counsel did not keep track of his witness for six to eight weeks prior to trial (p. 19), which is not true, or his attempt to suggest that a witness doctor who would not be able to appear until a later time (pp. 9, 17) was responsible for the ad-

journment, was based at best on second-guessing, not fact or evidence. This constitutes a clear abuse of discretion.

8. It constitutes clear error for a judge to dismiss a case for lack of prosecution when a party, here the plaintiff, *is ill,* exist, regardless of any possible prejudice that defendants might suffer from a continuance of the trial as a result. *Rankin* v. *Shayne Bros.*, 280 F. 2d 55 (DC Cir. 1960); *Jarva* v. *United States,* 280 F. 2d 892 (9th Cir. 1960). Judges are not permitted to penalize litigants who cannot proceed swiftly because of the very injury and its impairment of their finances and physical condition which constitute the basis of their claims. *Russell* v. *Cunningham,* 233 F. 2d 806 (9th Cir. 1956). Affidavits were submitted attesting to the fact that plaintiff was hospitalized and unable to attend court.

9. The mere lapse of time from the inception of the cause of action does not justify dismissal if the plaintiff has not been lacking in diligence. Expedition for its own sake is not the goal. *Carnegie National Bank* v. *City of Wolf Point,* 110 F. 2d 569 (9th Cir. 1940); *Alamance Industries, Inc.* v. *Filene's,* 291 F. 2d 142 (1st Cir. 1961); *Dyotherm Corporation* v. *Turbo Machines Corporation,* 392 F. 2d 146 (3rd Cir. 1968). What constitutes failure to prosecute depends on the facts of the particular case, and the court should consider all the pertinent circumstances in exercising its discretion. *Link* v. *Wabash R. Co.,* 370 U.S. 626 (1962).

10. Because the sanction of dismissal is the most severe sanction that a court may apply, its use must be tempered by a careful exercise of judicial discretion. Generally, its

use is warranted in circumstances where there is a clear record of delay or contumacious conduct by the plaintiff. *Connolly* v. *Papachristid Shipping Ltd.*, 504 F. 2d 917, 920 (5th Cir. 1974); *Richman* v. *General Motors Corp.*, 437 F. 2d 196, 199 (1st Cir. 1971); *Brown* v. *Thompson,* 430 F. 2d 1214 (5th Cir. 1970). There is no record of delay, nor has there been any delay by plaintiff in prosecuting his case. Dismissal for failure to prosecute in this case is an unduly severe sanction, based on the facts and circumstances of this case, and should not have been used by the court.

11. Insistence upon the use of defendant's deposition of the plaintiff and upon commencement of the trial without plaintiff, would substantially and materially impair the plaintiff's ability to prosecute the case (pp. 11-13, 15, 23). The Court's myopic insistence upon expeditiousness in the face of plaintiff's justifiable request for delay, due to his sudden, unexpected hospitalization, renders plaintiff's right to his day in court an empty formality. *Ungar* v. *Sarafite,* 376 U.S. 579, 589 (1964), *U.S.* v. *Ellenbogen,* 365 F. 2d 982 (2nd Cir. 1966).

WHEREFORE, it is respectfully requested that for all the grounds stated above, the Court vacate its order dismissing the action for failure to prosecute, and that the court grant plaintiff leave to reargue the request for an adjournment of the trial.

.....

KENNETH HELLER

Sworn to before me this
..... day of March, 1977.